IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 654

SIDMON McHIE and HAMMOND REALTY COMPANY, a corporation,

Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WALTER MYERS,
FREDERICK C. CRUMPACKER,
JAY E. DARLINGTON,
Hammond Building,
Hammond, Indiana,
Attorneys for Petitioners.

SWARTZ & COOPER,
105 W. Monroe St.,
Chicago, Ill.,
Attorneys for Respondents.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

TABLE OF CASES.

Cases Cited.

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MAY IT PLEASE THE COURT:

STATEMENT OF MATTER INVOLVED.

This case (130 Fed. 2nd 993) involves postnuptial settlement contracts in which both *personal* and *property* rights were covered by the same instruments, and concerning which it was held that personal rights could be breached with impunity as independent covenants regardless of the general tenor, effect and relation of the whole contracts.

Your petitioner, Sidmon McHie, made a contract with his wife in 1919 by the terms of which each would make a will in favor of the other, and under which petitioner would have inherited his wife's $250,000.00 estate. In 1926, in consideration of her covenant to cease annoying, molesting and bedeviling him for the rest of her life, he agreed to give up his right to her property under the 1919 contract. No sooner had the 1926 agreement been signed than she began to continue to annoy, molest and bedevil him, at the same time announcing a cynical contempt for the power of the "paid courts" to stop her from so doing, and this she kept up until she died in 1939. He divorced her shortly before her death, but the Circuit Court of Appeals' opinion expressly *excludes* the divorce decree as a factor in its decision, and bases the decision entirely on the law of *contracts* as applied to the 1919 and 1926 contracts. (R. 173 bottom; 174 top.)

Upon her death in 1939, it developed that she had left a will contrary to the 1919 contract. This will gave McHie nothing, but gave the bulk of her $250,000.00 estate to a dog training institution, in conformity with her personal motto which she had publicized during the years she was harassing McHie: "The more I see of men, the better I like dogs."

Among the assets of her estate were bonds of Hammond Realty Company guaranteed by McHie. Her executor sued McHie on this obligation and thereupon McHie counterclaimed, setting up his rights under the 1919 contract because Mrs. McHie had broken the 1926 agreement. The District Court for the Northern District of Indiana held that her breach of the 1926 agreement restored McHie's rights under the original 1919 contract and decreed him to be the equitable owner of the estate she left.

The 7th Circuit Court of Appeals, while admitting her flagrant and *malicious* violation of the 1926 agreement, held as a matter of law that *she could breach her covenant with impunity*, on the doctrine that it was an "independent covenant" and "not the essence of the contract," and that the essence of the contract was certain property clauses. It therefore reversed the District Court and denied McHie any right to her estate. If this decision is sound, it does the following things:

(1) It establishes the novel doctrine that *personal* rights are of *no consequence* when mingled with *property* rights in a contract, that the personal rights *can be maliciously breached with impunity*, and that the injured party is still bound by his side of the contract.

(2) It reverses the law of accord and settlement contracts established by the Indiana Supreme Court for a century,—that *all* covenants of a settlement contract must be fully performed, else the original contract revives.

(3) It reverses the law of accord and settlement contracts established by the United States Supreme Court and by the 1st, 2nd, 6th and 8th Circuit Courts of Appeals to the same effect as the rule of the Indiana Supreme Court.

(4) It reverses elementary principles of contract law laid down by American Law Institute's "Restatement Of The Law Of Contracts," and by such authorities as Mr. Williston and all the encyclopedias.

(5) The decision, unfortunately, ratifies Mrs. McHie's cynical prediction, made while she was committing

the breach, that the courts would be powerless to do anything about it.

R. 98, bottom.

R. 100, bottom.

(6) *The opinion contradicts itself on its face,* so as to leave the law unsettled and confused on independent covenants. While denying McHie relief on the ground that her annoying him was "independent" of the property covenants, the opinion turns around in the next sentence and condones her misconduct on the ground that he "annoyed" her by failing to pay money under a property covenant,—thereby admitting that the personal covenant not to annoy and the property covenants are *dependent.*

R. 174, top.

Note: The Circuit Court of Appeals' opinion is in R. 170 and the ruling on contract law is in R. 173, bottom. *The opinion is also printed as an appendix to this petition.*

This wife was McHie's second childless wife. She had no property of her own when he married her. He gave her this $250,000.00 fortune and took back a contract in 1919 binding her "irrevocably" to leave the fortune to him by will if she should die first (as she recently did). (R. 17, 19.)

In 1925, after she had extracted this fortune from him, she forced a separation by driving him out of his home at age sixty-two by threats and violence. Thereupon, in 1926, he and she made an agreement *settling* their *personal* and *property* rights. Among other things, he agreed to give up his rights to her property under the 1919 contract and she agreed not to molest or annoy him, and they agreed to live apart. The opening part of the 1926 agreement

recites that the *moving cause* of the contract is the *personal* desire of the parties to separate in order to avoid previous "friction" and to promote their "comfort, health and happiness," and that the property clauses are merely "*in connection with* the separation." (R. 27 top; 30 middle.) He subsequently divorced her in 1936, but the Circuit Court of Appeals' opinion expressly *excludes* the divorce decree as a factor in its decision, and bases its decision entirely on the law of *contracts.* (R. 173 bottom; 174 top.)

She flagrantly, wilfully and *maliciously* broke her covenant not to molest him, from the time she made it in 1926 continuously until she died in 1939, so this consideration that McHie bargained to get was wholly *unperformed.* (R. 121, top.)

While thus harassing McHie, she mocked and flouted the power of the "paid courts" to do anything about her breach.

R. 98, bottom.
R. 100, bottom.

In the federal District Court (N. D. Indiana) following her death, McHie sought enforcement of the 1919 contract (R. 15), while Mrs. McHie's executor claimed that the 1919 contract had been abrogated by the 1926 agreement. (R. 24, bottom.)

The District Court, upon uncontradicted documentary evidence (R. 93-102), found her guilty of *flagrant, wilful and malicious breach* of her 1926 covenant, as aforesaid, and found that this covenant "constituted one of the *true* considerations" for which McHie *in fact* executed the 1926 contract; and found that "said consideration had *completely failed* at the time of decedent's death," due to her own wilful and malicious breach.

R. 121, top.

The District Court concluded that McHie was entitled to his rights under the 1919 contract and decreed him to be the equitable owner of her estate, amounting to about $250,000.00. (R. 121, 122.) Mrs. McHie's executor appealed. (R. 128.)

The Circuit Court of Appeals admitted the correctness of the District Court's findings of fact, but held as a matter of *law* that *she could commit the breach with impunity* because the right breached was not a *property* right, saying in its opinion:

> "The essence of the contract of March 22, 1926 was the settlement of the extensive *property* rights of the parties * * *. *Because* the Sixth Covenant (not to molest or annoy him) was an *independent* covenant and *not the essence* of the contract, we do not think its breach constituted such failure of consideration as to entitle the defendant Sidmon McHie to treat the (1919) contract as ended." (Our language interpolated in parenthesis.)
>
> R. 173 bottom; 174 top.

Besides drawing a line between property and personal rights, the opinion contradicts itself on the question of whether the covenant against annoyance is, or is not, independent. While denying McHie relief on the ground that her annoying him was "independent" of the property covenants, the opinion turns around in the next sentence and condones her misconduct on the ground that McHie "annoyed" her by failing to pay money to her under one of the property covenants,—thereby admitting that the personal and property covenants are actually *dependent* on one another. The opinion says:

> "The defendant, Sidmon McHie, as we have pointed out, breached the contract as to *payments* for support. He never paid on it after May, 1932. *This* undoubtedly *annoyed* Isabel D. McHie, and was doubtless the

reason why she exhibited her annoyance to and *molested* the defendant Sidmon McHie."

R. 174, top.

The District Court's decree specifies that Mrs. McHie's executor holds *all* her property as *trustee* for McHie, "for the purpose of specific performance" of the 1919 contract. (R. 127, top.) The effect of the executor's appeal was to *destroy the trust* created by the District Court, and completely to *change the beneficial ownership* of the trust estate,—taking it away from McHie and giving it to the legatees in Mrs. McHie's last will.

Her last will, made in 1935, leaves McHie nothing, but leaves the bulk of her estate to a dog-training institution. She says in her will that she predicates her right to do this on the ground that the 1926 contract "is still in existence." (R. 107, top.)

While seeking to *destroy this trust* and to take the ownership thereof away from McHie on appeal, the executor *was acting under the trust* below and was collecting a trust asset *for the benefit of McHie.* This asset consisted of Hammond Realty Company bonds which Mrs. McHie owned at her death. The same decree which sets up the trust reduces the bonds to a money judgment in favor of the executor against Hammond Realty Company. *This judgment is part of the assets of the trust* established by the decree.

As soon as the decree was rendered, the executor proceeded immediately to enforce and collect this trust asset (money judgment), both before appeal to the Circuit Court of Appeals and while the appeal was pending undecided. This enforcement consisted of collecting $1,000.00 cash from the debtor corporation by writ of execution on the

judgment (R. 162, top) and also causing the Marshal to levy the writ on the debtor's real estate. (R. 150.)

Under the last mentioned facts, McHie moved the Circuit Court of Appeals to dismiss the appeal (R. 160), on the ground that the executor's *inconsistent* conduct of *acting for* McHie and collecting a trust asset below, while appealing *against* McHie and attacking the trust above, waived the appeal. Appellant answered the motion, admitting the facts but denying that they constituted a waiver of the appeal. The answer expressly admits that the appellant

> "is attempting to collect the judgment for *his* (McHie's) *benefit.*"
>
> R. 165, par. 4, end.

The Circuit Court of Appeals' opinion denies the motion to dismiss. The opinion quotes Indiana Supreme Court authority that the test for dismissal is whether appellant has "accepted the benefits of the adjudication." (R. 171.) It then proceeds to misconstrue and violate the quoted rule in the following respects:

(1) This decision ignores the crucial fact that appellant was *acting under the trust* decree below, and was collecting a trust asset for the benefit of the *beneficiary* decreed below. This amounts to the trustee "accepting the benefits of an adjudication" which is the test for dismissal laid down in the Indiana case quoted. (R. 171.)

(2) The decision ignores the crucial fact that appellant was not "entitled in any event" to collect trust assets for *McHie's benefit* in the court below. Its appeal was for the *legatees' benefit* and if successful would change the ownership of the asset from

McHie to the legatees. Hence, this case does not fall within the exception stated in the opinion. (R. 171.)

(3) The decision is based on the false and superficial premise that McHie was not prejudiced by the "collection" below. **McHie was fundamentally prejudiced by having his trustee pretend to serve two masters—him below and his opponent above.** His trustee was not compelled to start serving him below while appealing, but having chosen to start serving him, it waived the appeal.

(4) This decision as to waiver of appeal violates precedents of the United States Supreme Court and Circuit Courts of Appeals for the 3rd and 8th circuits, cited under "Reasons for Allowance of Writ," *infra.*

Hence, the motion to dismiss does not rest on any technical defect in the appeal but on appellant's *voluntary conduct* affecting the *subject matter* of the case, which waives the appeal according to both Indiana and federal law. Denial of this *substantive* right of appellee merits review, and if well taken disposes of the case.

CITATION OF DECISION BELOW.

The District Court's decision is not reported but appears in R. 119-127.

The Circuit Court of Appeals' decision, rendered on October 30, 1942, within three months of this petition, is not yet officially reported but appears in:

Fifth Avenue Bank of New York v. *Hammond Realty Company and Sidmon McHie*, 130 F. (2d) 993.

R. 170.

Note: For convenience, the opinion is also printed as an appendix to this petition, under the same page numbers as appear in the Record.

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is invoked under *Title 28, Sec. 347(a), Judicial Code, sec. 240, amended*, empowering this Court to review "*any*" case in a Circuit Court of Appeals by certiorari.

This case falls within the class indicated by *Rule 38* as meriting review, because:

(1) The decision lays down an erroneous principle of contract law in conflict with decisions on the same matter by:

(a) The Supreme Court of the United States,

(b) The 1st, 2nd, 6th and 8th Circuit Courts of Appeal,

(c) The Indiana Supreme Court (case originated in Indiana).

(2) The opinion is self-contradictory on its face and thereby unsettles the contract law on "independent covenants".

(3) The decision "so far departs from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision," to-wit: By permitting a trustee appellant to *serve two masters* during appeal. This conflicts with decisions on the same matter by:

(a) The Supreme Court of the United States,

(b) The 1st and 8th Circuit Courts of Appeal,

(c) The Indiana Supreme Court.

QUESTIONS PRESENTED.

The Circuit Court of Appeals' opinion admits the facts found by the District Court, and rests upon one question of *contract* law and one question of *waiver* of appeal, both fundamental, and both decided contrary to federal and Indiana precedents. These questions are:

(1) Are *personal* rights (such as the right not to be annoyed, molested and bedeviled) on a par with *property* rights when both are mingled in a contract? In other words, can one party *maliciously* violate the personal covenant and still hold the other party to the contract, on the doctrine that the personal right is "not the essence" of the contract, in spite of the express recital in the contract that the personal feature is the moving cause of the contract?

(a) Should the Circuit Court of Appeals be permitted to reverse the substantive contract

law of Indiana (where the case originated) and reverse an elementary principal of contract law,—namely that *all* covenants of an accord or settlement contract must be *fully* performed, else the original contract revives?

(2) Can a trustee appellant *serve two masters* during an appeal? In other words, can appellant pretend to collect part of the trust assets below for McHie's benefit, while appealing for the benefit of McHie's opponents (legatees under the will)?

(a) Should the Circuit Court of Appeals be permitted to violate the substantive law of Indiana, and also violate precedents of the Supreme Court and of the 3rd and 8th Circuit Courts of Appeal, on an elementary principle of waiver,—namely that accepting the benefit of a decree below waives the appeal?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The decision violates elementary principles of contract law. It places *property* rights in the 1926 contract above *personal* rights in the same contract, and holds that the latter can be violated with impunity on the doctrine that they are "not the essence of the contract."

(1) Such decision violates the plain language of the 1926 contract which recites that the *personal* desire to separate, to be let alone and not to be annoyed or molested is the *moving cause* of the contract and that the property clauses are merely "*in connection with*" the separation.

R. 27 top; 30 middle.

(2) The decision violates Indiana Supreme Court precedents for a century on accord and settlement contracts,—the Indiana law being that

> "an accord cannot constitute a bar * * * unless shown to have been *fully* executed * * * Upon the failure (to fully perform) * * * they were remitted to their *original rights* * * * as if the accord had never been agreed upon."
>
> *Jackson* v. *Olmstead* (1882), 87 Ind. 92, 94.
> *Kingan* v. *Gibson* (1870), 35 Ind. 53, 54, top.
> *Demeese* v. *Cheek* (1871), 35 Ind. 514.

(3) The decision violates the law of accord and settlement contracts established by the United States Supreme Court and by the 1st, 2nd, 6th and 8th Circuit Courts of Appeals that "*nothing short of fulfillment* of the (settlement) agreement would discharge the original demand."

Brown v. *Spofford* (1877), 95 U. S. 474; 24 L. Ed. 508, 510, second column.

Frankfurt-Barnett Co. v. *William Prym Co.* (1916) (C. C. A. 2), 237 Fed. 21, 27.

Wind v. *England Walton & Co.* (1923) (C. C. A. 1), 287 Fed. 97, 99.

Shubert v. *Rosenberger* (1913) (C. C. A. 8), 204 Fed. 934, 938.

First Nat. Bank v. *Leech* (1889) (C. C. A. 8), 94 Fed. 310, 311.

Humphreys v. *Third Nat. Bank* (1896) (C. C. A. 6), 75 Fed. 852, 859.

(4) The decision violates elementary principles of contract law laid down by American Law Institute, by Mr. Williston in his authoritative work on contracts, and by the encyclopedias,—these principles being:

"If the accord is *not performed*, the creditor's duty thereunder is discharged, and he may *enforce his original claim.*"

Restatement of Law Contracts (1932 perm. Ed.), Sec. 417.

"*Part performance* of the accord is of no more avail than tender. *The old claim is still undischarged.*"

Williston on Contracts (1938, Revised Ed.), Sec. 1843 end.

"*Nothing short* of actual, full, *complete*, and exact performance or execution of the agreement of accord in its *entirety* will suffice."

1 C. J. S. page 541, sec. 37.

1 C. J. pages 532, 533.

"The execution must be *complete*, for if *part* of the *consideration* agreed on is not performed, the whole accord fails."

1 Am. Jur. page 253, sec. 67.

(5) The above principle is not confined to accords, but applies to contracts generally:

"* * * one party *should not be required to perform* if the other does not. The latter principle, like the excuses based on fraud, duress or mistake, is founded on concepts of *justice*, and is *imposed by law* although there may be no reason to suppose that the question that has arisen was within the contemplation of the parties."

Restatement of Law of Contracts (1932 Perm. Ed.), Sec. 274, at page 400.

(6) The decision commits fundamental error by dealing with the *wrong field* of contract law. It is predicated on the "*independent covenant*" doctrine which is applicable mainly to *commercial* contracts. The 1926 contract was a settlement of *property* and *personal* rights between husband and wife, which calls for the application of the law of accord, and failure of consideration. It was not a commercial contract.

But even on the basis of the "independent covenant" doctrine the decision is wrong. It misapplies the doctrine, because:

(a) The doctrine is inapplicable to the uncontradicted documentary facts. The 1926 contract recites that the *inducing cause* of the separation and of the separation contract was

the personal consideration of not being molested and annoyed,—to avoid previous "friction" and to promote their "comfort, health and happiness." (R. 27, top.)

(b) The District Court expressly found that her covenant not to annoy and molest McHie "constituted one of the *true considerations* for said *Agreement.*" The District Court further found that "one of the several considerations for which counterclaimant (McHie) in fact executed *the contract* of March 22, 1926 * * * was a covenant by said decedent that she '*shall not molest or annoy*' him." The finding plainly says that this promise by her was in fact a consideration which induced McHie to execute the *contract* as a whole,—not merely as an independent separate covenant. (R. 121, top.)

(c) The Circuit Court of Appeals' opinion admits the facts found below (R. 173) but holds as a matter of law that the independent covenant doctrine applies. (R. 174.)

(d) Such ruling violates the basic principle laid down by the American Law Institute,—that a covenant is *dependent* when it is an *inducing cause* of the whole contract, and also when the covenant is of such character that its breach cannot adequately be compensated in damages, and particularly where the breach is *wilful.*

Restatement of Law of Contracts (1932, Perm. Ed.), sec. 270, sec. 275(b)(e).

Board v. *South Bend etc. Ry. Co.* (1888), 118 Ind. 68, 79, 20 N. E. 499 (end).

(e) This ruling also violates the elementary principle that "Courts will not and ought not to construe promises as independent unless no other interpretation is possible."

12 Am. Jur. page 850, sec. 298.

Williston on Contracts (1938 Revised Ed.) sec. 1847.

"It is evident the inclination of courts has strongly favored the latter construction (*dependent* covenants) as being obviously the most just."

The Bank of Columbia v. *Hagner* (1828), 1 Peters (26 U. S.), 455, 465; 7 L. Ed. 219, 223.

(7) *The opinion is self-contradictory* on the "independent covenant" doctrine. While deciding against McHie on the ground that her covenant not to annoy and molest him was "independent" of the property clauses, the opinion turns right around in the next breath and tries to condone her breach of this covenant by arguing that she did it because of his failure to pay certain support money under one of the *property clauses*. Hence, the opinion makes the covenant "independent" for the purpose of deciding against McHie, but "dependent" for the purpose of glossing over her breach.

R. 174, top.

Moreover, the opinion inadvertently states only a half-truth when it makes the above accusation that McHie defaulted his support money payments. The undisputed record shows that McHie paid money to this woman until he was bled white and by 1932 his total fortune, once millions, was reduced to the modest figure of between

$35,000.00 and $55,000.00, a mere fraction of her fortune, barely sufficient to take care of him in his old age, and these assets consisted of slender equities liable to be lost under heavy mortgages. Hence, his suspension of the $1,000.00 per month support payments to her was caused by dire necessity and not by any wrong or wilfulness on his part. (R. 84, middle.)

Contrary to the opinion's argument that her misconduct was *caused* by McHie's suspension of payments (R. 174, top), the District Court found that her misconduct was *caused by malice* and that she began this misconduct as early as 1926, *six years before* McHie suspended payments in 1932, so the suspension could not have been the cause.

R. 121, top.

Though founded on a false premise of fact, the opinion's argument that McHie's default of a *property* covenant to pay money would operate to justify her breach of the *personal* covenant against annoyance, is an *implied ruling* that the personal and property covenants are *dependent* (as they really are). This reasoning in the opinion destroys the conclusion reached in the next sentence that the covenant against annoyance is *independent.*

This confusion can be cut short by taking the opening part of the 1926 separation agreement which recites that its moving cause is to *avoid friction* and to promote their "*comfort, health and happiness*" and that "in connection with" the separation, property rights are "relinquished". (R. 27, top.) The agreement then concludes with the Sixth Covenant against annoyance, so as to make effective the moving purpose. (R. 30, middle.) Then compare the District Court's finding, the accuracy of which is not challenged in the Circuit Court of Appeals' opinion, namely:

"One of the several considerations for which counterclaimant (McHie) in fact *executed* the *contract* of March 22, 1926, was a covenant by said decedent (Mrs. McHie) that she 'shall not annoy or molest' him. Said decedent *continuously, completely and flagrantly* breached said covenant from the time it was made down to the time of her death, by continuously and *maliciously* annoying and molesting him during that entire period. Said *consideration* had *completely failed* at the time of decedent's death."

R. 121, top.

Authorities in Opinion Distinguished.

(8) The opinion bases its "independent covenant" doctrine *solely* on two *domestic relations* cases: one involving *support of children* and the other *adultery.* These cases resemble ours only slightly on the facts and not at all on the law, to-wit:

Hughes v. *Burke* (1934), 167 Md. 472, 175 Atl. 335, 337, was where a wrong-doing husband *abandoned* wife and *children,* after which he contracted to support them. Held: Wife's alleged molestation of him did not discharge duty to support. The case was never cited in the same or any other court until the present opinion adopts it as a leading case on contract law.

Sabbarese v. *Sabbarese* (1929), 104 N. J. Eq. 600, 146 A. 592, holds that wife's *adultery* is a good defense to *separate maintenance suit.* Contains *dictum* that wife's molestation of husband would not be defense to enforcement of support money contract, but holds her concealed adultery is a defense to such contract.

Our case involves a broader question,—the husband's right to restoration of an earlier contract

giving him her $250,000.00 estate at her death. Moreover, the above cases of *Hughes* v. *Burke,* 167 Md. 472, and *Sabbarese* v. *Sabbarese,* 104 N. J. Eq. 600, state the *minority* rule. The majority rule holds covenants against molestation to be *dependent,* even in support money cases:

> "The wife may *breach* a separation *agreement* * * * by molesting and threatening the husband."
>
> *Lindey on Separation Agreements* (1937), page 325, citing *Hughes* v. *Burke,* 167 Md. 472, as a minority case and citing the following majority cases:
>
> *James* v. *Golson* (1915, Tex.), 174 S. W. 688.
>
> *Badolato* v. *Badolato* (1916), 104 Wash. 194, 176 Pac. 24.
>
> *Pezzoni* v. *Pezzoni* (1918), 38 Calif. App. 209, 175 Pac. 801.
>
> *Muth* v. *Wuest* (1902), 78 N. Y. S. 431.
>
> *Shimp* v. *Gray* (1910), 41 Pa. Super. Ct. 542.

II.

The decision violates an elementary principle on waiver of appeal. It permits appellant to pretend to *serve two masters* during the appeal,—pretending to collect part of the trust assets for *McHie's benefit* below, while actually appealing for the *legatees' benefit* (McHie's opponents).

(1) Appellant's answer to our motion to dismiss the appeal expressly admits:

> "Sidmon McHie is presently the beneficial owner of said judgment * * * plaintiff (appellant) is attempting to collect the judgment *for his* (*McHie's*) *benefit.*"
>
> R. 165, par. 4.

(2) The decision violates the very Indiana precedent quoted in the opinion. This precedent says that Indiana law is

> "declaratory of the common law rule that a party cannot *accept the benefit* of an adjudication and yet allege it to be erroneous." (R. 171.)
>
> *State ex rel. Jackson* v. *Middleton* (1938), 215 Ind. 219, 224; 19 N. E. (2d) 470, 472.

It also violates the following Indiana precedents which hold that accepting benefits of a favorable part of the decree waives the appeal *even though* the part accepted was *uncontroverted:*

Sterne v. *Vert* (1886), 108 Ind. 223, 224; 9 N. E. 127.

Sonntag v. *Klee* (1897), 148 Ind. 536, 538; 47 N. E. 962.

It also violates the following Indiana precedents which hold that waiver of appeal results from taking two *inconsistent positions* below and above, "the one affirming and the other denying the validity of the judgment."

Wyncoop, Adm. v. *Langhner* (1939), 106 Ind. App. 457, 459, 460; 19 N. E. (2d) 486.

Western Construction Co. v. *Board, etc.* (1912), 178 Ind. 684, 688, bottom; 98 N. E. 347.

(3) The decision violates precedents of the Supreme Court of the United States, and of the 3rd and 8th Circuit Courts of Appeals, to the same effect as the above Indiana cases:

South v. *Morris* (1934) (C. C. A. 3), 69 F. (2d) 3, 4, bottom 2nd column, citing *Albright* v. *Oyster, infra.*

Albright v. *Oyster* (1844), (C. C. A. 8), 60 Fed. 644.

Keonigsburger v. *Richmond Silver Mining Co.* (1895), 158 U. S. 41; 39 L. Ed. 899; 15 S. Ct. 751, 756, near end of opinion.

(4) The decision violates both Indiana and federal precedents which hold that parties acting in a representative capacity, such as trustees, administrators and attorneys, are subject to the same law as other litigants with respect to waiving appeals, and that those for whom they appeal are bound by their waiver.

65 C. J. 1077, sec. 1004.

Wyncoop, Adm. v. *Langhner* (1939), 106 Ind. App. 457, 459, 460; 19 N. E. (2d) 486.

Thompson v. *Midland etc. Cement Co.* (1905), 37 Ind. App. 459, 463; 77 N. E. 299.

South v. *Morris* (1934) (C. C. A. 3), 69 F. (2d) 3, 4, bottom 2nd column.

(5) Since the principle here involved is *waiver* of appeal rather than estoppel, the true test is appellant's *inconsistent conduct* below rather than "hurt" to the appellee, as the opinion erroneously holds (R. 172, top).

Nevertheless, McHie is seriously "hurt" by appellant's double-dealing in the two courts, due to the fact that McHie is the *sole stockholder and sole owner of the debtor corporation* from whom the judgment is being collected. This is shown by the exhibits of appellant's own pleading. (R. 52 middle; 55 middle.)

Hence, appellant's conduct places McHie in the quandary of not knowing whether appellant is levy-

ing on his corporation's assets for *his* benefit or for the benefit of his *opponents* (legatees). If for his own benefit, he can safely let appellant take the corporation's property on the judgment, but if for the benefit of his opponents he must protect the property against sacrifice at execution sale. Putting him in this quandary violates both the spirit and letter of the rule on waiving appeals.

Male v. *Harlan*, 12 S. D. 627, 82 N. W. 178, 180, 2nd column.

(6) Nor could it be argued that the substantive law of *waiver* of the right to appeal is changed by the new rules regulating procedure:

Schenk v. *Plummer* (C. C. A. 9), 113 F. (2d) 726.

U. S. v. *Sherwood*, 312 U. S. 584, 590, top; 61 S. Ct. 767, 771, top, 2nd column.

CONCLUSION.

This unique case decides two things in conflict with elementary principles established in Indiana, in the United States Supreme Court, in other Circuit Courts of Appeals, and announced by such authorities as Mr. Williston and American Law Institute:

(1) It is erroneously decided that *personal* rights are "not the essence" when mingled with *property* rights in a settlement contract, and hence, that one party can "flagrantly" and maliciously violate the personal rights with impunity while holding his opponent bound by the property clauses.

(2) It erroneously holds that a trustee appellant can *serve two masters* during appeal,—pretending to collect a trust asset for the trust beneficiary below,

while seeking to destroy the trust and shift ownership of the asset to the beneficiary's opponents on appeal.

These principles, we respectfully submit, merit review by this Honorable Court.

WHEREFORE, petitioners, Sidmon McHie and Hammond Realty Company, each separately pray that this petition be granted, that the Writ of Certiorari may issue to review this case, and for all further proper orders in the premises.

WALTER MYERS,
FREDERICK C. CRUMPACKER,
JAY E. DARLINGTON,
Attorneys for Petitioners.